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Letter dated 1 October 2012 from the Permanent Representative of Guatemala to the United Nations addressed to the Secretary-General

I have the honour to inform you that, under the presidency of Guatemala, the Security Council is scheduled to hold an open debate on the subject "Peace and justice, with a special focus on the role of the International Criminal Court". The debate will take place on Wednesday, 17 October 2012. In order to help steer the discussions on the subject, Guatemala has prepared the attached concept note (see annex).

I would be grateful if the present letter and the annex thereto could be circulated as a document of the Security Council in connection with the item entitled "The promotion and strengthening of the rule of law in the maintenance of international peace and security".

(*Signed*) Gert **Rosenthal**
Ambassador
Permanent Representative

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Annex to the letter dated 1 October 2012 from the Permanent Representative of Guatemala to the United Nations addressed to the Secretary-General

Open debate of the Security Council on "peace and justice, with a special focus on the role of the International Criminal Court", 17 October 2012

Concept note

[Original: English and Spanish]

Introduction

1. "No peace without justice" resonates throughout the world, especially in settings where conflict has been experienced. While progress in both peace and justice must be pursued simultaneously and must complement each other, the reality is that in different circumstances the objective of achieving peace is given priority over the objective of achieving justice, at least in the short term. In fact, the United Nations has long debated the need to create a balance between peace and justice. This challenge is increasingly before the Security Council in its day-to-day work as it seeks to develop a holistic approach to conflict prevention and conflict resolution. There are strong indications that past wrongs left unpunished and unrecognized have played a key role in the eruption of new conflicts and the commission of new crimes. In this context, the Rome Statute of the International Criminal Court offers important options to the Council, especially in situations where it is confronting mass atrocities. The functions of the Council and those of the Court are complementary, since they both are aimed at protecting populations at risk. Perpetrations of mass atrocities that constitute crimes under the Rome Statute usually threaten international peace and security. Thus, preventing mass atrocities and insisting on international accountability can contribute to the maintenance of international peace and security.

2. In exploring the roles of the Security Council and the International Criminal Court, one finds that both bodies have a clear mandate under their respective constituent treaties, namely, the 1945 Charter of the United Nations and the 1998 Rome Statute. The Charter, in its Article 24.1, provides that the Council, in carrying out its duties under its primary responsibility for the maintenance of international peace and security, acts on behalf of all Members of the United Nations. For their part, the 121 States parties to the Rome Statute have chosen to accept the Court's jurisdiction in accordance with the Statute, which, in its seventh preambular paragraph, reaffirms the purposes and principles of the Charter and provides that its States parties shall act accordingly. Wider recognition should be given to the fact that the relationship between the Security Council and the International Criminal Court promotes the rule of law, encourages respect for human rights and contributes to the achievement of sustainable peace, in accordance with international law and the purposes and principles of the Charter. In broader terms, the mere existence of the Court, which tries to address impunity at the international level, should act as a deterrent of mass atrocities. This preventive function is entirely consistent with the spirit and letter of the role of the Council.

Background

3. Peace and justice are also closely related to the desire for both reconciliation and accountability. Sixty years ago, in the Nuremberg trials, those who had committed massive crimes were held accountable for the first time before the international community. Almost half a century later, the world witnessed two genocides — the first in the former Yugoslavia, and the second in Rwanda — which prompted the Security Council to again formally connect peace and international justice by creating the International Tribunals for the Former Yugoslavia and Rwanda. They were also the prime source of inspiration for the establishment in 1998 of the International Criminal Court, which has changed the parameters for the pursuit of peace, on the basis of the understanding that lasting peace requires justice. The Council has also contributed to the furtherance of peace and justice by addressing other situations through United Nations-assisted tribunals such as the Special Tribunal for Lebanon and the Special Court for Sierra Leone. These ad hoc and mixed tribunals have developed international law, prosecuted some of the worst perpetrators and contributed to the restoration of lasting peace in conflict-torn regions.

4. This wide-ranging practice has also given rise to questions regarding the sequencing of peace and justice. Trade-offs in the short-term have taken place when political considerations (for whatever motives) have been prioritized over principles (insisting on accountability without reservations). This is illustrated, for example, by the fate of Charles Taylor, former President of Liberia, who was granted asylum in Nigeria in exchange for relinquishing power in Liberia, until Nigerian authorities approved Liberia's request for his transfer to the Special Court for Sierra Leone. Nigeria was praised by the Security Council both for its willingness to grant Taylor asylum in the interests of peace and, subsequently, for having turned him over to the Court in the interests of justice.[a] The Council's commitment was further voiced in its press statement of 27 April 2012 (SC/10630), in which its members welcomed the issuance of the verdict of the Special Court for Sierra Leone, which had found Charles Taylor guilty of aiding and abetting as well as planning crimes against humanity, war crimes and other serious violations of international humanitarian law during Sierra Leone's civil war. In a more general vein, the members of the Council reaffirmed their determination to end impunity for serious violations of international humanitarian law.

Objective

5. The Security Council was the setting for significant debates with respect to the International Criminal Court as early as in July 2002, only two weeks after the entry into force of the Rome Statute, with the adoption of a resolution deferring the investigation or prosecution of United Nations peacekeeping forces.[b] In recent years, it has focused primarily on country-specific situations on its agenda since March 2005, related to the situation in Darfur,[c] and February 2011, related to the

[a] See resolution 1688 (2006).

[b] See resolutions 1422 (2002) and 1487 (2003). See also press releases on Council meetings SC/7450 (4572nd), SC/7437 (4563rd), SC/7438 (4564th), SC/7441 (4566th) and SC/7445/Rev.1 (4568th) and the letter addressed to the President of the Council contained in S/2002/754.

[c] See resolution 1593 (2005). See also S/PRST/2008/21.

situation in Libya.[d] This has also been the case with relevant thematic topics such as the protection of civilians, women and peace and security, and the rule of law.[e] A clear evolution in the Council's approach to the Court is made evident by several references to the Court in the work of the Council. However, up to now the relationship between the Security Council and the International Criminal Court has never been comprehensively discussed in the Council, despite the fact that ample experience has been accumulated in the interaction between the Council and the Court in their shared pursuit of peace and justice.

6. For these reasons, the Guatemalan presidency has proposed an open debate on the interplay between legal and political understandings regarding the fight against impunity, as something potentially beneficial to both bodies. The holding of this debate is timely and relevant. Its purpose is twofold: first, to explore how the International Criminal Court, as a tool of preventive diplomacy, can assist the Security Council in carrying out its mandate to uphold the rule of law, maintain peace and security, and combat impunity while ensuring accountability for mass atrocities; and second, to examine how the relationship between the two bodies has developed over the past decade and, more important, to consider the way forward in strengthening their linkages. In this context, it is worth noting that in 2012 the Court celebrated its tenth anniversary, handed down its first verdict and welcomed a new Prosecutor and the Rome Statute continued to gain new States parties.[f]

Key linkages and elements for discussion

7. *The fight against impunity*. The International Criminal Court is triggering new efforts to prevent and stop mass atrocities. The Rome Statute, in its fourth preambular paragraph, affirms that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured. In the statement by its President dated 19 January 2012 (S/PRST/2012/1), the Security Council recalled the contribution of the Court, ad hoc and mixed tribunals, as well as chambers in national tribunals, to the fight against impunity for the most serious crimes of concern to the international community.[g] This year, the first-ever verdict of the Court was handed down in the *Lubanga* case,[h] which can be considered a victory for the fight against impunity and a landmark case regarding the use of child soldiers. The case underlines the fact that the Rome Statute system, adopted 14 years ago, has become fully operational. Without cooperation between the Security Council and the International Criminal Court, some of the worst international crimes would have never been tried.

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[d] See resolution 1970 (2011).

[e] See resolutions 1960 (2010), 1888 (2009), 1894 (2009) and 1820 (2008); see also S/PRST/2012/3, S/PRST/2012/1, S/PRST/2011/20, S/PRST/2010/25, S/PRST/2010/11 and S/PRST/2010/22.

[f] Currently 121 States parties; Guatemala's was the most recent accession, on 2 April 2012.

[g] This was further highlighted in the Council's press statement of 5 July 2012 (SC/10700), regarding the contribution of courts and tribunals to the fight against impunity.

[h] In its press statement of 16 March 2012 (SC/10580), the Council noted with appreciation the issuance of the first verdict of the Court and the members of the Council reaffirmed their strong opposition to impunity for the most serious crimes of international concern. They also recognized that it was an important moment for the victims who had suffered as a result of Lubanga's actions.

8. The International Criminal Court is faced with complex undertakings in situations in which the Security Council is trying to attain parallel objectives in its own sphere of competence, such as re-establishing security; upholding the rule of law; protecting civilians; bringing about security sector reform; achieving disarmament, demobilization and reintegration; providing humanitarian assistance; promoting political dialogue between the parties to the conflict; and preparing for reconstruction and development. The fact that the Court operates while armed conflicts are ongoing fuels the peace and justice debate. Several indictments have been issued against persons responsible for atrocities committed during some of the worst conflicts on the Council's agenda. Recent decisions and actions of the Council are examples of its increasing practice of mainstreaming Court-related provisions into country-specific situations, such as resolution 2056 (2012), on Mali; resolution 2053 (2012), on the Democratic Republic of the Congo;[i] resolutions 2062 (2012) and 1975 (2011), on Côte d'Ivoire; and the presidential statement of 29 June 2012 (S/PRST/2012/18), on the Central African Region (Lord's Resistance Army).

9. The world is undergoing a transition from a culture of impunity to a culture of the rule of law and accountability. States could do more to sharpen the tools for ending impunity and ensuring accountability. Moreover, Member States should consider how the Security Council can best use the International Criminal Court as a tool for upholding the rule of law and accountability. This requires an effective exchange of evidence and information between the Council and the Court. Article 87.6 of the Rome Statute provides that the Court may ask any intergovernmental organization to provide information or documents, and that it may also ask for other forms of cooperation and assistance. To that end, the functions of the United Nations High Commissioner for Human Rights facilitate the use of a variety of means for the purpose of early warning, including reporting to the Security Council, at its request, with regard to situations and issues of special concern. In addition, reports of commissions of inquiry and fact-finding missions have proved relevant in corroborating information concerning the nature and the gravity of particular situations.

10. *Referral and deferral powers.* The main formal links between the Security Council and the International Criminal Court concern the authority of the former to issue referrals or deferrals. As is well known, referrals are made under article 13 (b) of the Rome Statute and in accordance with Chapter VII of the United Nations Charter. Possible deferrals in the consideration of specific cases are made pursuant to article 16 of the Rome Statue and in accordance with Chapter VII of the Charter. It is understood that the Council should exercise its powers of referral and deferral effectively and responsibly. Follow-up by the Council on its own referrals to the Court is important for the credibility of the Council and for the legitimacy of international criminal justice. That is why, when the Council refers a situation to the Court, it ought to be seen as being committed to the Court's being able to achieve a successful prosecution, because when the rule of law is openly defied and the Council does nothing to prevent such defiance, the rule of law is undermined. Reluctance on the part of the Council to take any further measures or facilitate the Court's progress beyond merely receiving the periodic reports of the Prosecutor concerning each situation could be seen by the international community as a lack on

[i] See also the Council press statement of 3 May 2012 (SC/10634) regarding the Democratic Republic of the Congo.

the Council's part of the commitment necessary to uphold the rule of law in general and accountability in particular.

11. During the first decade of the Court's existence, the Security Council has referred two situations to the Court, by way of resolutions 1593 (2005) and 1970 (2011). It is worth emphasizing that referrals by the Council are meant to serve as deterrents against further crimes. Nevertheless, referrals should be made only in extraordinary circumstances and generally as a measure of last resort, after other non-forcible measures have proved insufficient. Predictability and consistency in choosing situations worthy of investigation by the Court are also required. Since the Council, in deciding which situations to refer to the Court, must take into account which situations are the most threatening to the peace, it needs to enunciate and adhere to recognizable criteria so that it is not perceived as being wholly arbitrary in terms of which cases it refers, what avenues need to be exhausted before it makes referrals, and what limitations are imposed on referrals (the conditions that apply to them).

12. The point is that the rule of law is grounded in stable and non-arbitrary rules, and when the Security Council is using a legal tool to promote the rule of law, it too should be seen as adhering to the rule of law if it wishes to be successful in achieving its goal. This does not prevent the Council from deciding on other measures simultaneously with the adoption of a referral, especially because the latter only grants the Court jurisdiction, and thus neither the Prosecutor nor the judges are bound by it.[j] It is also the responsibility of the Council to ensure respect for the decisions of the Court in concrete situations stemming from referrals. In that regard, one must look to the Council's recent press statement, dated 15 June 2012 (SC/10674), concerning the detention in Libya of staff members of the Court, urging the Libyan authorities to work towards their immediate release. More important, the members of the Council emphasized that it was the legal obligation of Libya, under resolution 1970 (2011), to cooperate fully with and provide any necessary assistance to the court pursuant to that resolution.

13. One of the most distinctive provisions of the Rome Statute concerns deferrals. Its article 16 allows the Security Council, with regard to a specific situation or case, to defer an investigation or prosecution when deemed necessary for the maintenance of international peace and security. Through article 16, the Council moves the Court beyond a legal ideal into a political reality in which peace and justice can sometimes come into conflict. Hence, it is important to appropriately interpret and implement article 16. The possibility of applying it has come before the Council in a few cases; however, the members of the Council have never agreed on the matter. It should be stressed that article 16 does not deprive the Court of jurisdiction, nor does it grant an amnesty to those under investigation. Rather, it simply provides a temporary opportunity to find a solution to address the broader threats posed to international peace. Careful consideration should also be given to the practical effects of the

[j] The Prosecutor bears the great responsibility of striking the right balance in deciding, on a case-by-case basis, whether to initiate a formal investigation (article 53 of the Rome Statute), or whether to refrain from doing so because it would jeopardize the higher interests of justice in the broad sense. The Prosecutor must make his or her own assessment as to the facts and possible future developments, and make an autonomous decision regarding the balance of interests.

deferral of a situation in terms of the preservation of evidence, the status of detainees and the lives and safety of victims and witnesses.

14. *Cooperation and enforcement.* According to article 3 of the Relationship Agreement between the United Nations and the International Criminal Court, both bodies shall "cooperate closely, whenever appropriate, with each other and consult each other on matters of mutual interests". Under article 86 of the Rome Statute, States parties have the general obligation to cooperate with the Court on all matters relating to its proceedings, and thus the fulfilment of the Court's mandate. In the context of the Court's relationship with the Security Council, the question of cooperation becomes even more central, both in situations in which the Council has made a referral to the Court and with regard to the Court's investigations into situations either referred by States parties or initiated proprio motu by the Prosecutor. As stated previously, there is a need for the Council to stand behind its own decisions, i.e., to follow up on referrals, in particular in the event of a lack of cooperation. This is especially important in instances in which the Court has notified the Council of non-cooperation on the part of States in terms of failing to give effect to arrest warrants of the Court arising from the Council's own referrals.[k] At a minimum, the Council should call upon all United Nations Member States to cooperate fully with the Court in any investigation referred by the Council.

15. The issue of how to implement an arrest warrant remains a major challenge. With its limited enforcement resources, the International Criminal Court is reliant upon the cooperation and assistance of States, which can be enhanced through Security Council action. Cooperation between the Council and the Court could take on many forms, some of which would not require the invocation of Chapter VII. The United Nations system in general, especially the Secretariat and the personnel of peacekeeping operations, could do more to give operational content to the notion of non-essential contacts with indicted persons, as has been urged by the authorities of the Court. In addition, the Council should utilize the existing and potential capabilities of regional and subregional organizations dealing with peace and justice issues. It should continue to invite the Court and relevant regional organizations to discuss practical arrangements that would facilitate the work of the Prosecutor and the Court, including the possibility of conducting proceedings in any regional or subregional setting that would contribute to regional efforts in the fight against impunity.[l]

16. There are several ways to foster the relationship between the Security Council and the International Criminal Court. One could be to extend an annual invitation to the President of the Court and the Prosecutor to brief the Council, discuss matters of mutual interest and find ways and means to strengthen mutual cooperation. The holding of informal interactive dialogues to address existing challenges could also be considered. The idea of establishing a forum for addressing questions of cooperation with the Court through a subsidiary body of the Council has also been suggested.

17. *Complementarity and the strengthening of domestic systems to ensure accountability.* A central feature of the Rome Statute is the principle of complementarity, whereby States have the primary duty to investigate or prosecute

[k] See S/2012/9, S/2012/8, S/2011/318 and S/2010/456. See also articles 87.5 and 87.7 of the Rome Statute.

[l] Resolution 1593 (2005), para. 3.

those responsible for the most serious crimes of international concern. In specific situations, the Security Council could also request the investigation and prosecution of cases by national authorities under this principle. The precise way in which States carry out this duty may vary. Article 17.1 (a) of the Rome Statute provides that a case is inadmissible if it has been "investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution". If the State can show that it has a credible form of criminal justice, then its jurisdiction will have primacy over that of the Court. This principle also applies in the case of Security Council referrals. Alternatively, the Council may prefer to explicitly call on national authorities to investigate and prosecute, rather than refer a situation to the Court right away. In fact, the threat of a referral could, under certain circumstances, encourage national prosecutions more effectively.

18. According to the Rome Statute's principle of complementarity, national judicial processes are the first line of defence against impunity. Thus, it is first and foremost the duty of national courts to effectively investigate, prosecute and punish the perpetrators of the most serious crimes of international concern. This principle should be further enhanced, both out of respect for State sovereignty and because of the practical constraint of limited resources. In addition, it reinforces the Security Council's role in ensuring accountability. Successful investigations and prosecutions may have some deterrent effect by, at a minimum, increasing awareness of the types of acts that are likely to be punishable offences. The principle also assists in restoring dignity to victims through acknowledgement of their suffering and helps to create a historical record that protects against those who seek to deny that atrocities have occurred. The International Criminal Court can serve to advance criminal justice mechanisms at the domestic level, while promoting the rule of law and long-term stability. In the pursuit of a broader justice, not only domestic prosecutions, but also truth-seeking mechanisms, reparation programmes, institutional reforms and reconstruction, are needed as a part of the process of moving a society forward in a sustainable way.

19. *Aggression*. Aggression, referred to in Article 39 of the United Nations Charter, is the most serious and dangerous form of the illegal use of force between States. Owing to its gravity, it is usually committed together with other crimes proscribed by the Rome Statute. The Security Council plays a very important role in this area, as will be the case with the International Criminal Court in the light of the 2010 Review Conference of the Rome Statute, held in Kampala. With the consensus decision to amend the Statute to include a definition of the crime of aggression, as well as the conditions for the Court's exercise of jurisdiction, States parties completed the most important piece of unfinished business from the 1998 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. The Court's jurisdiction over crimes of aggression has yet to be activated and requires ratification by at least 30 States parties, as well as a further decision by States parties to be taken no earlier than 2017. There is little doubt, however, that the Court's jurisdiction over crimes of aggression will enhance the Council's toolbox in the maintenance of international peace and security, because in future the Court will also be authorized to investigate and prosecute crimes of aggression on the basis of Council referrals.

Final considerations

20. The International Criminal Court is not just a treaty-based international court; it is the centrepiece of a worldwide system of international criminal justice that concerns the global community as a whole and of which the Security Council is an integral and essential part. Whenever the Council, by virtue of the powers of referral granted to it under the Rome Statute, has entrusted a matter to the Court, political stability, the rule of law and accountability have been furthered. It is therefore necessary that both the Council and the Court continue to effectively discharge their respective responsibilities.

21. The Security Council has a genuine interest in promoting peace and justice. States have accepted the notion that some crimes are so heinous that they must not go unpunished. Furthermore, prosecuting these crimes is recognized as necessary to prevent future violations of international law. The rule of law and accountability are powerful impediments to conflict. By asserting the rule of law for international crimes, States can help mitigate the environment of impunity that serves as a breeding ground for major human rights atrocities. In any case, conflict resolution initiatives considered by the Council should be compatible with the values enshrined in the Rome Statute, so that peace and justice work effectively together.

22. One final thought goes beyond the strict confines of peace and justice to encompass broader development objectives. In order to generate a peace dividend, it is necessary to work to integrate comprehensive justice perspectives, as well as development perspectives, into the work of the Security Council, which can assist in breaking cycles of violence, laying the groundwork for sustainable peace and establishing the rule of law.

23. The relationship between the Security Council and the International Criminal Court is important and unique. Although the apparent tension between peace and justice may continue to prevail, what the Council should aim at is achieving peace along with justice, and the Court can further both goals.